

**Selected Documents from Claim File**

**Claim No. LRF-2000-1006-01**

Claim Amt. : \$9,975.03 Initial Entry Date : 10/06/2000

Claimant : Interstate Rock Products Inc

Property Desc. : See Comments

Property Addr. : 1239 N Silverado Ct

Leeds, UT 84746

STATUS : PENDING (SECTION REVIEW)

Comments Page: 001 UserID: kschwab

Plat description is El Dorado Hills Subdivision Phase 3, Lot 22, Washington County, Utah

## Associated Addresses

Type : Claimant Legal Counsel

DOPL # : - -

Firm Nm : Thompson &amp; Urquhart

Name : Stephen H Urquhart

148 E Tabernacle

St George, UT 847703442

(435) 628-7777

Type : Claimant Address

DOPL # : 22-227139-5501

Firm Nm : Interstate Rock Products Inc

Name :

42 S 850 W STE 201

Hurricane, UT 847373210

(435) 635-2628

Type : Home Owner - Secondary

DOPL # : - -

Firm Nm :

Name : Stephanie Martini

970 E 700 S #72

St George, UT 84770

(435) 652-0309

Type : Home Owner - Primary

DOPL # : - -

Firm Nm : claimed property

Name : Stephanie Martini

1239 N Silverado Ct

Leeds, UT 84746

( ) -

Type : Non-Paying Party Legal Counsel

DOPL # : - -

Firm Nm :		
Name :	Sherri Flans Palmer (bankruptcy)	
	3600 S Market6 St, STE 203	
	West Valley City, UT 84119	
	(801) 965-1787	
Type :	Non-Paying Party - Primary	
DOPL # :	-	
Firm Nm : Jeff Mitchell Concrete (JMC)		
Name :	Jeff Mitchell	
	608 N 1275 W	
	St George, UT 847704372	
	(435) 628-2104	
Type :	Original Contractor/Developer	
DOPL # :	99-370870-5501	
Firm Nm : Casa Bella Homes Inc		
Name :	Alice Green	
	2041 S Visa Court	
	St George, UT 84770	
	(435) 274-7511	
DEMOGRAPHIC INFORMATION		
Claim #:	LRF-2000-1006-01	Claimant: Interstate Rock Products Inc
DOPL Licensee:	no	
Entity Type:	Corporation	
Number of Employees:	100+	
Gross Annual Revenue:	5M AND UP	
Years In Business:	10-19	
Claiming Capacity:	Supplier	
NON-PAYING PARTY		
DOPL Licensee:	no	
Entity Type:		
===== CLAIMS PROCESSING INFO =====		
	Date Recieved	Date Forwarded
Front Desk	10/06/2000	
Permissive Party Response	11/11/2000	DEADLINE*****
Substantive Review	11/14/2000	
Claim Disposition	Approve	
Comments	Page: 001	UserID: chris
Claim is referred to board on the issue of a written contract with a licensed contractor. Complete description is located on page 4 of the claim under the written contract heading. Lien recovery staff is		

unable to make a determination on this claim.

Board Disposition

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JURISDICTIONAL CHECKLIST =====

Completion Of QS	10/29/1999
Civil Bkcy Filing	04/24/2000
Difference	178

Comments	Page: 001	UserID: chris
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Claimant listed on the notice of filing a lien that the last day qualified services were performed were 10/29/99.

Complaint was filed against NPP on 4/24/00.

Civil Judg/Bkcy Filing	06/21/2000
LRF App Filing	10/06/2000
Difference	107

Comments	Page: 001	UserID: chris
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Judgment was entered against the NPP on 6/21/00, and the claim was filed and stamped by DOPL 10/6/00.

===== COMPLETE APPLICATION CHECK-LIST =====

Form Submitted	Yes	10/06/2000	
Form Completed	Yes	11/14/2000	
Fee	Yes	10/06/2000	-13-1156 ICN
Signed Cert/Aff	Yes	10/05/2000	
Cert of Service	Yes	10/05/2000	
Demog. Questionnaire	No		

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Demographic questionnaire was not completed, but it is not required to receive payment from the fund.

===== SUPPORTING DOCUMENTS =====

Written Contract	Inc	Written Contract	07/01/1999
Licensing Statute	Inc	License	04/06/1999
Full Payment	Yes	Affidavit	06/02/1999
Civil Action/Bankrupt	Yes	Complaint	04/24/2000
Entitlement to Pmt.	Yes	Civil Judgment	06/21/2000

Exhaust Remedies	Yes	SO/RS/WE/RE	06/21/2000
===== REQUIRED FACTUAL FINDINGS CHECK-LIST =====			
Claimant Qualified Beneficiary	Yes		
Comments	Page: 001	UserID: chris	
Claimant registered with the Fund on 10/25/95, and holds active licence #227139.			
Written contract exists	Yes		
Comments	Page: 001	UserID: chris	
Claimant provided copy of contract executed between Homeowner and Original Contractor. Contract is for construction of a new residence and was signed by all parties January 11, 1999.			
Original Contractor Licensed	Bd		
Comments	Page: 001	UserID: chris	
Original Contractor holds active license #370870, which was activated on April 6, 1999.			
<p>Claim was conditionally denied because the contract was signed on January 11, 1999. The original contractor became licensed on April 6, 1999. From these dates, the contract was signed before the contractor was licensed with the state. In response to the conditional denial was a letter from the claimant's attorney which reads "Attached please find affidavits of Stephanie Martini and Alicia Green (Casa Bella Homes, Inc.). You will notice that the two testify that the construction elements of the parties' contract were activated by the condition subsequent that Ms. Green received her contractors license. The contract specifies this arrangement in paragraph 5. I respectfully ask that you give this matter your close attention. Please call, if I can be of further assistance." And also included are two affidavits signed by both the home owner and the qualifier of Casa Bella Homes, Inc. (the original contractor).</p>			
<p>These notarized affidavits both recognize that no one ever intended for the contractor to begin construction on the home until the contractor received a license. The construction contract had two phases, the first for design work, and then phase two would begin the actual construction when the contractor obtained licensure. The construction portion of the contract was subsequently activated by the parties only after the contractor license was received from the State of Utah.</p>			
<p>It appears this agreement between the home owner and the original contractor are in conflict with Utah Code Ann. 58-55-501 (1) which defines unlawful conduct as including "engaging in a construction trade, acting as a contractor, an alarm business or company, or an alarm company agent, or representing oneself to be engaged in construction trade or to be acting as a contractor in a construction trade requiring licensure, unless the person doing any of these is appropriately licensed or exempted from licensure under this chapter." Further, Utah Cod Ann. 38-11-204-3 (a) requires that for a claim to be payable, the qualified beneficiary must prove "the owner of the owner-occupied residence or the owner's agent entered into a written contract with an original contractor licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for the performance of qualified services, to obtain the performance of qualified services by others, or for the supervision of the performance by others of qualified services in construction on that residence."</p>			
<p>Even though the construction wasn't started until the contractor was licensed, it seems to the division that Casa Bella Homes, Inc. was representing itself to be engaged in the construction trade at the time the construction contract was signed, which means that the original contractor must be licensed at the time the</p>			

contract is signed.

Owner PIF to Contractor Yes

Comments Page: 001 UserID: chris

Per affidavit signed by president of original contractor, "Casa Bella has been paid in full for the services it rendered under its written contract with the owners.

Residence Own/Occ as defined Yes

Comments Page: 001 UserID: chris

Per affidavit signed by owner occupied resident.

Residence Single Family/Duplex Yes

Comments Page: 001 UserID: chris

Per affidavit signed by owner occupied resident.

Contract For QS Yes

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Notice of mechanic's lien claim lists a date the last materials were furnished by claimant to non paying party. Amount is also listed, and verified by being the amount awarded in the judgment.

Claimant brought Civil Action Yes

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Civil judgment in favor of claimant and against NPP entered June 21, 2000.

Exhausted Remedies Yes

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Claimant provided notice of bankruptcy filing for the NPP as a proof of exhausted remedies. The bankruptcy was filed on 6/12/00.

Adequate \$ in LRF Fund Yes

Statutory Limit/Payment no

Comments Page: 001 UserID: chris

Total payments this residence to date: \$0.

Exceed Monetary Cap	No
Comments	Page: 001      UserID: chris
Total payments to claimant to date: \$0.	
Un-reimbursed Payments	no
Comments	Page: 001      UserID: chris
To date fund has paid \$0 of claims on behalf of claimant and received \$0 of reimbursement.	

Claim Number:	LRF-2000-1006-01	NCA Number:	NCA-2000-0522-01	Claim Type:	Informal
Claimant Name:	Interstate Rock Products Inc				
	Jdg. \$ Informal / Payable \$ Formal	Apportioned % 100.00	CLAIMED	DIFERENCES	
PRINCIPAL AMOUNT	8,970.47	8,970.47	8,970.47	0.00	
ATTORNEY FEES	775.00	775.00	775.00	0.00	
COSTS	95.00	95.00	95.00	0.00	
INT. % 0.00	1,076.46	1,076.46	134.56	-941.90	
PRE SUB-TOTAL	1,946.46	1,946.46	1,004.56	-941.90	
ATTORNEY FEES	1,225.00	1,225.00	0.00	-1,225.00	
COSTS	131.39	131.39	408.52	277.13	
INT. % 0.00	0.00	0.00	0.00	0.00	
POST SUB-TOTAL	1,356.39	0.00	408.52	-947.87	
TOTAL*****	12,273.32	12,273.32	10,383.55	-1,889.77	

#### QUALIFIED SERVICES COMMENT

Comments	Page: 001      UserID: chris
Total amount of qualified services awarded in judgment was 8,970.47. This amount is specific towards this residence.	

#### PRE JUDGEMENT ATTORNEY FEE COMMENT

Comments	Page: 001      UserID: chris
Total amount of attorney fees awarded in judgment were \$775, and they were all attributed to this residence.	

#### PRE JUDGEMENT COSTS COMMENT

Comments	Page: 001      UserID: chris
Costs were awarded in the amount of \$95 for this residence.	

#### PRE JUDGEMENT INTEREST COMMENT

Comments	Page: 001      UserID: chris
Per U.C.A. 38-11-203 (3) (c) interest calculated at 12% from payment due date to claim approval date.--net of any delays attributable to the claimant.	

Payment due date was November 28, 1999. Interest begins this day.  
Claim conditionally denied November 14, 2000. Interest ceases to accrue effective this date.  
Claimant provided information needed to complete claim March 1, 2001. Interest resumes accruing on this date.  
Board will hear claim March 14, 2001. Interest terminates on this date.

POST JUDGEMENT ATTORNEY COMMENT

Comments Page: 001 UserID: chris

Affidavit of attorney fees shows the total amount of fees documented for this claim in the amount of \$2,565.50. The amount awarded in the judgment was \$775.00 and was attributed to the pre judgment costs. The rest of the amount (\$1,790.50) is put to the post judgment attorney fees, and is subject to R156-38-204 (2) (b) (ii) which states: "if the payable amount of qualified services is greater than \$3,000 and \$10,000 or less, not more than 25% of the value of qualified services and not exceeding \$2,000." So the post judgment amount pays the rest of the fees up to the \$2,000 limit.

POST JUDGEMENT COSTS COMMENT

Comments Page: 001 UserID: chris

Post judgment costs were included in the amount of \$408.52 which is the rest of the amount listed on the affidavit of costs and fees after the amount of \$95.00 was included as the pre judgment costs. The total amount was \$503.52.

Review of the documents supporting the affidavit show of the \$503.52 of costs, \$277.13 is photocopies. That number derives from a billing the attorney received for the month of August 2000. The billing is for all copies made by the firm during the month of August.

The Division finds it extremely unlikely that the Claimant is the only client this firm represents. Therefore, the Division finds it unreasonable to believe that all \$277.13 of photocopies is attributable to this claim. Lacking the ability to differentiate what portion, if any, of the copies relate to the claim the Division is denying the entire amount.

POST JUDGEMENT INTEREST COMMENT

NO Disposition Checklist Information



**Minutes from Board Meeting Discussion**  
**Claim No. LRF-2000-1006-01**

**March 14, 2001**

Attorney Stephen Urquhart represented Interstate Rock. At issue in this claim is whether the contractor was licensed at the time the contract was signed. Attorney Urquhart argued that the contract had two definite phases. The first was for design and the second was for construction after the license was approved for the general contractor. Mr. Patterson pointed out that the contract does not show that the second phase would be triggered by the licensure of the general. There is no language in the contract that would cancel the contract if the original contractor did not received licensure. In fact, the original contractor was obligated to begin construction "before fall of 1999" irrespective of whether licensure was approved. There is no indication that the contract is to be bifurcated. The statute requires the homeowner to contract with a licensed contractor. It is "unlawful conduct" in §58-55-501(8), to contract to build a home without having a contractor license. In response to a question from Mr. Burton, Mr. Webster indicated that in *TB Construction, Inc.* the department found that the license does not exist until the auditor has completed the review and the license has been printed. Mr. Patterson found no way for the contract to be canceled if the contractor did not become licensed. Mr. Burton asked Ms. Lima's opinion. She agreed with Mr. Patterson's opinion. Mr. Burton then explained that the board did not have equitable powers and could not vary from the statute. Attorney Urquhart argued that the intent of the Legislature was to protect the homeowner. He thought that Mr. Patterson was disregarding the homeowner affidavits that explained this point. He agreed that the contract could have been written more effectively but it still shows the correct legalese.

Mr. Cottle commented that there was not a contract with a licensed contractor because the contractor party to the agreement was unlicensed and signed a contract that requires a licensed contractor signature. He then referred to §58-55-503(1) "[A]ny person who violates the provisions of Subsection 58-55-501(8) may not be awarded a contract for the performance of the work." Mr. Cottle indicated that this clearly shows that the contract was not executable as it related to the construction phase of this project.

Mr. Jensen moved to deny payment of the claim because the board must follow the statute exactly. Mr. Weller seconded the motion and all voted affirmatively.

**BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING**  
**OF THE DEPARTMENT OF COMMERCE**  
**OF THE STATE OF UTAH**

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IN THE MATTER OF THE LIEN RECOVERY :	<b>ORDER</b>
FUND CLAIM OF <b>INTERSTATE ROCK</b> :	
<b>PRODUCTS</b> REGARDING THE :	
CONSTRUCTION BY <b>JEFF MITCHELL</b> :	Claim No. LRF-2000-1006-01
<b>CONCRETE</b> a/k/a <b>JMC</b> ON THE :	
RESIDENCE OF <b>STEPHANIE MARTINI</b> :	

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Pursuant to the requirements for a disbursement from the Lien Recovery Fund set forth in UTAH CODE ANN. § 38-11-203(3) (1999) and being apprized of all relevant facts, the Director of the Division of Occupational and Professional Licensing finds that the claimant has not complied with the requirements of UTAH CODE ANN. § 38-11-204(3)(a)(i) (1999), which reads:

To recover from the fund, . . . a qualified beneficiary shall establish that . . . the owner of the owner-occupied residence or the owner's agent entered into a written contract with an original contractor licensed or exempt from licensure under Title 58, Chapter 55, . . . for the performance of qualified services, to obtain the performance of qualified services by others, or for the supervision of the performance by others of qualified services in construction on that residence. (emphasis added)

When a party communicates its acceptance of another party's offer, the two parties enter into a contract. Therefore, for the above-stated requirements to be met the original contractor must be licensed on the day the original contractor and the homeowner agree to a written contract.

In the case at hand, the homeowner executed a contract with Casa Bella Homes, Inc.— who fills the role of original contractor as defined in UTAH CODE ANN. § 38-11-102(12) (1999).

The contract was agreed to by signature on January 11, 1999 and provides:

Contractor [Casa Bella Homes, Inc.] and Owner enter into this Agreement **for construction of a new single family home** pursuant to plans and specifications identified by Contractor and Owner to be constructed on the lot . . . owned by or being purchased by Owner (emphasis added).

The contract further binds the parties to the provision that:

The work to be performed under this Contract shall commence in two phases: phase one, the preparation of the plans, will begin upon execution of this contract and phase two, **actual construction of the residence, will begin** upon completion of phase one and by mutual agreement of owner and contractor, but **no later than fall of 1999** (emphasis added).

On January 11, 1999 the homeowner and the original contractor entered into a written contract obligating the original contractor to construct a single-family dwelling for the homeowner.

UTAH CODE ANN. § 38-11-204(3)(a)(i) requires the original contractor must be licensed at the time the parties enter into the contract.

Casa Bella Homes, Inc. applied for licensure March 5, 1999; that application was approved and a license was issued April 6, 1999. In *The Matter of Agency Review of TBP Construction, Inc.* (LRF-2000-0713-01) the Department of Commerce found that an applicant for licensure as a contractor does not become licensed “until the license [is] issued by the Division.” Therefore, Casa Bella Home, Inc. became licensed on April 6, 1999, and was not licensed on January 11, 1999 when the parties entered into the contract. The claimant, therefore, has not met the requirements of UTAH CODE ANN. § 38-11-204(3)(a)(i) and the claim is invalid.

During the Advisory Board review of the claim, claimant argued the second phase of the contract was contingent upon Casa Bella Homes, Inc. becoming licensed as a contractor and, as such, the contract for construction of the residence should be considered as entered into upon the date Casa Bella Home’s license was issued. In support of this position claimant presented affidavits from the homeowner and from Casa Bella Home’s qualifier stating that the parties understood the construction phase of the contract would be forestalled until Casa Bella Homes became licensed. This argument is rejected for three reasons.

First, the affidavits reflect that the agreement to forestall construction was only an understanding and was never reduced to writing as a formal provision of the contract. Rather the contract specifically provides:

It is understood that this Agreement, together with the approved documents referred to and/or attached hereto, **constitutes the entire agreement between Contractor and Owner**. . . . This Agreement, together with the attachments referred to herein, **supersedes any prior understandings, agreements or representations between the parties** upon the subject covered by this Contract. There are no representations or warranties other than set forth herein. No modification or changes to this Agreement shall be valid or binding upon either party to be bound hereby (emphasis added).

Therefore, while the parties may have understood construction would be forestalled pending Casa Bella Homes becoming licensed, that understanding was superseded by the contract. By the terms of their contract, the parties agree the unwritten understanding is superseded by the written contract. That contract requires that Casa Bella Homes begin construction of the residence once phase one is completed but not later than the fall of 1999 (see above). Further, the contract does not provide language that would release Casa Bella Homes from its obligation to begin construction before the fall of 1999 if Casa Bella Homes was unable to procure licensure. To wit, the understanding does not create a situation wherein the second phase of the contract can be considered a separate, distinct contract entered into after Casa Bella Homes was licensed.

Second, even though the contract document identifies two phases, the contract itself is a single contract for the construction of a residence. The parties were not required to enter an additional contract before construction was to begin because all elements necessary to form a binding construction contract were present in the January 11, 1999 document. After the completion of the first phase, the parties were not required by the contract to negotiate any additional terms before construction began. The parties were obligated to have construction

begin before the fall of 1999 irrespective of the licensing issue. Casa Bella Homes' obligation to construct the residence was created when the contract was signed on January 11, 1999.

Third, to consider the second phase of the contract a separate, distinct contract would be tantamount to complete rejection of the licensing requirements as set forth in Utah Code Ann. Title 58, Chapter 55. That chapter clearly requires that an entity must become licensed prior to engaging in any construction trade activities. Specifically, UTAH CODE ANN. § 58-55-301(1)(a) (2000) requires:

**Any person** engaged in the construction trades licensed under this chapter, as a contractor regulated under this chapter, . . . shall become licensed under this **chapter before engaging in that trade or contracting activity** in this state unless specifically exempted from licensure under Section 58-1-307 or 58-55-305 (emphasis added)

Further, UTAH CODE ANN. § 58-55-501 (2000) provides:

Unlawful conduct includes:

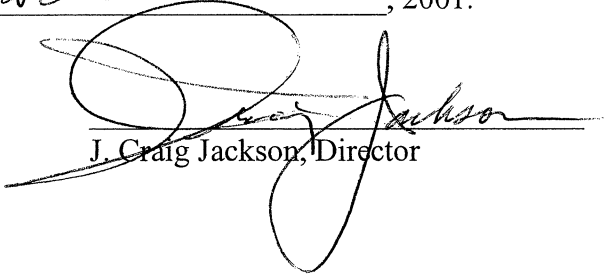
(1) engaging in a construction trade, acting as a contractor. . . or representing oneself to be engaged in a construction trade or to be acting as a contractor in a construction trade requiring licensure, **unless the person doing any of these is appropriately licensed** or exempted from licensure under this chapter; . . .

(8) **submitting a bid for any work for which a license is required** under this chapter by a person not licensed or exempted from licensure as a contractor under this chapter (emphasis added).

In the case at issue, the contractor not only violated the requirement to not submit a bid until licensed, it went one step beyond by actually entering into the contract for construction.

WHEREFORE, the Director of the Division of Occupational and Professional Licensing orders that the above-encaptioned claim is denied.

DATED this 16<sup>th</sup> day of March, 2001.

  
J. Craig Jackson, Director

THOMPSON  
AWERKAMP  
URQUHART

April 10, 2001

Douglas C. Borba  
Executive Director  
Utah Department of Commerce  
160 East 300 South/Box 146701  
Salt Lake City, Utah 84114-6701

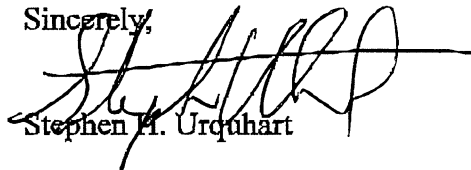
Re: LRF-2000-1006-01

Dear Director Borba:

Attached please find an Order regarding the above-referenced claim and an appeal of that Order. Respectfully, I would request that action be taken on the appeal without additional oral argument, because of cost to my client, unless of course such argument could be had in St. George.

Your consideration of this matter is appreciated.

Sincerely,



Stephen H. Urquhart

RS:rs  
Enclosures

cc: All Parties

THOMPSON, AWERKAMP & URQUHART  
Ronald W. Thompson, #3242  
Stephen H. Urquhart, #7445  
37 West 1070 South, Ste. 102  
St. George, Utah 84770  
Telephone (435) 628-7777

Attorneys for Claimant

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BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING OF  
THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

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IN THE MATTER OF THE LIEN  
RECOVERY FUND CLAIM OF  
INTERSTATE ROCK PRODUCTS  
REGARDING THE CONSTRUCTION  
BY **JEFF MITCHELL CONCRETE**  
a/k/a JMC ON THE RESIDENCE OF  
**STEPHANIE MARTINI**

**APPEAL OF ORDER**

Claim No. LRF-2000-1006-01

Interstate Rock Products, Inc. ("IRP"), by and through its counsel of record Stephen H. Urquhart of Thompson, Awerkamp and Urquhart, respectfully appeals the Order entered by the Division of Occupational and Professional Licensing ("DOPL") on March 16, 2001, wherein Claim Number LRF-2000-1006-01 was denied. Specifically, IRP requests that the Department reverse that Order and order that IRP's claim be paid as adjusted to reflect interest, costs and fees incurred by DOPL's initial denial of the claim.

Denial is based solely on DOPL's interpretation that the terms of Utah Code Annotated, section 38-11-204(3)(a)(i) (1999), were not met. Specifically, the Division ruled that the owner did not "enter[] into a written contract with an original contractor licensed or exempt from licensure."

See Order, at 1. Such determination turns on a legally and factually incorrect interpretation of the parties' contract.

By way of letter dated February 27, 2001, and accompanying affidavits, IRP pointed out to DOPL that the owner and contractor had entered into a phased contract. The first phase was design work. The second phase – construction – was only to be triggered by Alicia Green successfully obtaining her contracting license. Such a condition subsequent means that relevant elements of the contract dependant upon the condition legally do not have any force and effect – in essence they do not exist – unless and until the condition is met. Once the condition is met the relevant provisions come into existence. Thus, particulars regarding actual construction did not legally exist until Ms. Green successfully obtained her contracting license. Accordingly, the requirements of the above-referenced code were satisfied. The owner did not contract for construction with Ms. Green until Ms. Green was in fact a licensed contractor. Conversely, had Ms. Green failed to obtain her contracting license, the construction provisions would have never legally come into existence and never bound the parties.

DOPL avoids this common sense conclusion, by utilizing a stingy and legally-flawed interpretation of basic contract law. See, e.g., Order, at 3 (“the affidavits reflect that the agreement to forestall construction was only an understanding and was never reduced to writing”). The law in this State is absolutely clear that courts will reform contracts where “the instrument as made failed to conform to what both parties intended.” See Mabey v. Kay Peterson Constr. Co., 682 P.2d 287, 290 (Utah 1984); Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints, 565 P.2d 63, 64-65 (Utah 1977); and Warner v. Sirstins, 838 P.2d 666 (Utah Ct. App. 1992).

Here, both parties intended a phased contract. DOPL had before it “affidavits from the



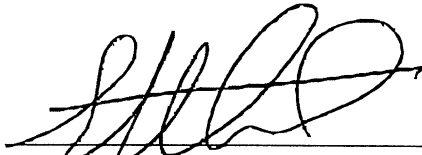
homeowner and from Casa Bella Home's qualifier stating that the parties understood the construction phase of the contract would be forestalled until Casa Bella Homes became licensed." See Order, at 2. Unless DOPL has reason to believe that such affidavits were perjurious, that understanding is what the parties agreed to, regardless how those non-lawyers configured the actual wording of the contract. To deny that construction of the relevant agreement is to contradict volumes of consistent case law on rudimentary contract principles.

In short, the owner and contractor could not and did not enter into a contract for construction of the home prior to Ms. Green obtaining her license. Only after Ms. Green obtained her license did provisions regarding actual construction bind the parties and take effect. That was the intention of the parties, as clearly reflected in the affidavits which are part of the record before the Department, and that intention is what governs. A court of law would reform the contract to match that intent. Accordingly, the owner did enter into a written contract with an original licensed contractor.

The Residence Lien Recovery Fund exists to satisfy bona fide claims, not to generate legal disputes and legal fees. Accordingly, the Department should construe the contract according to the sworn testimony of the parties and pay out the claim.

WHEREFORE, IRP respectfully requests that the Department reverse DOPL's Order and, in its place, order that IRP's claim be paid as adjusted to reflect the increased interest, costs, and fees incurred by reason of DOPL's initial rejection of the claim.

DATED this 10<sup>th</sup> day of April, 2001.

  
\_\_\_\_\_  
STEPHEN H. URQUHART  
Attorney for Claimant IRP

THOMPSON, AWERKAMP & URQUHART  
Ronald W. Thompson, #3242  
Stephen H. Urquhart, #7445  
37 West 1070 South, Ste. 102  
St. George, Utah 84770  
Telephone (435) 628-7777

ATTORNEY GENERAL'S  
OFFICE

MAY 07 2001

RECEIVED

Attorneys for Claimant

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING OF  
THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN  
RECOVERY FUND CLAIM OF  
**INTERSTATE ROCK PRODUCTS**  
REGARDING THE CONSTRUCTION  
BY **JEFF MITCHELL CONCRETE**  
a/k/a **JMC** ON THE RESIDENCE OF  
**STEPHANIE MARTINI**

**REPLY**

Claim No. LRF-2000-1006-01

Interstate Rock Products, Inc. ("IRP"), by and through its counsel of record Stephen H. Urquhart of Thompson, Awerkamp and Urquhart, files the following Reply to the opposition memorandum filed by the Division of Occupational and Professional Licensing ("DOPL").

First, DOPL argues that it must avoid just outcome and proper execution of its responsibilities because of an artificial and, frankly, silly distinction between equitable and legal powers. Quite simply, DOPL must interpret contracts as part of its responsibilities under the Residence Lien Restriction and Lien Recovery Fund Act, Utah Code Annotated, §§38-11-1 et seq. DOPL has no hesitation in so doing. See, e.g., DOPL Order, passim (the entire Order is an interpretation of the contract); DOPL Reply, at 9-10 (contract interpretation). If DOPL engages in such activity, it should and must do so in conformance with the laws of the State. There is nothing

“equitable” about doing a job correctly and in accordance with the law. Even if a party were to follow a line of demarcation between equitable and legal powers, correct interpretation of a contract is a legal matter; trying to avoid such interpretation to avoid the intended agreement and allow for some other outcome would be an act in equity. Claimant is not asking anyone to confer new or additional rights on it; claimant is simply asking that the contract be interpreted according to the laws of this State to allow the intentions of the parties to govern.

If the laws of the State mandate that a contract is the sum of the parties’ intentions – even if not properly reduced to writing – DOPL must follow that guiding standard.<sup>1</sup> For DOPL to take a contrary position is absurd and means nothing more than the agency is digging in its heels, contrary to evidence and justice, and is casual about wasting claimants’ resources by forcing the matter to a decision-making body (i.e., the judiciary) that will properly and dispassionately apply the law of the State. DOPL’s argument is simply a confession that it deems itself outside and above the laws of the State – a position that the Department should not countenance. Because – as DOPL concedes – the parties’ intentions are the contract (DOPL Reply, at 2) and, here, those intentions support claimant’s position, this claim should be paid.

Second, DOPL throws out a “marshalling the evidence” argument, without explaining how claimant failed to marshal evidence. See DOPL Reply, at 5 (“Claimant did not marshal the evidence. . .”). While it would work well for DOPL to have the Department or, later, a court accept as conclusive DOPL’s findings of fact through a “marshalling” failure, there is no question that claimant marshaled the evidence; DOPL received the contract and the parties’ affidavits regarding

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<sup>1</sup> The Bevans case is inapposite. Claimant is not asking for an equitable adjustment of any sort. It is asking that the contract be interpreted according to the facts and law, so that its valid claim can be paid without further waste of resources. To suggest that the Legislature has not granted DOPL the power to act in accordance with State law

that contract. Those items are even referenced in DOPL's Order. See Order, at 2.2 No more evidence is required to show the intent and, thus, the proper interpretation of the contract. Thus, the argument is nothing more than disjointed and irrelevant case cites thrown around a reiteration that DOPL decided to turn a blind-eye to the affidavits and their clear statement of the parties' intent. If DOPL chooses not to consider such evidence that has nothing to do with claimant's marshalling of adequate evidence.

Lastly, DOPL's third and fourth arguments are a rehash of its determination that the contract was not phased. If, of course, it was phased as the parties intended, the construction phase was not "entered into" until Ms. Green obtained her license and consideration supporting that agreement kicked in at that time. Contrary to DOPL's position, there was not consideration or binding obligation (in other words, no contract) regarding actual construction, until the contingency of licensing was satisfied. If the parties' intentions govern – as Utah court's have clearly told us they do – the construction contract was "entered into" after Ms. Green was licensed. Again, to deny that contracts can be phased based on contingencies is to deny the law of the state and the reality of the business world DOPL is supposed to serve.

In conclusion, when faced with the parties' clear description of their intentions regarding the phased contract, DOPL had two choices – (1) interpret the contract as the parties intended or (2) determine that the affidavits were perjurious and disregard them. To follow a third option of simply disregarding the affidavits and, then, argue that the Legislature did not intend for DOPL to follow the law of the State when interpreting contracts is impermissible. More to the point, it is arbitrary and

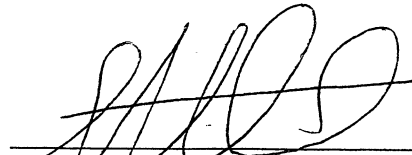
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manifests a gross misunderstanding of legislative intent in empowering DOPL to intervene in matters involving residential liens.

2 Administrative Rule 151-46b-12(3)(e) establishes that DOPL is to provide the record on appeal. Out of that

capricious and is not supported by the evidence. Accordingly, the department should order that IRP's claim be paid as adjusted to reflect interest, costs and fees incurred by DOPL's initial denial of the claim.

DATED this 2<sup>nd</sup> day of May, 2001.

  
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STEPHEN H. URQUHART  
Attorney for Claimant IRP

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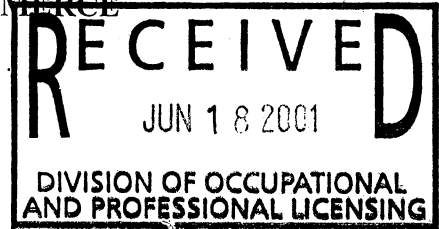
record, Claimant has properly referred the Department to the contract and the letter dated February 27, 2001, and the accompanying affidavits. See Appeal of Order, at 2.

Conformal Copy

BEFORE THE DEPARTMENT OF COMMERCE

OF

THE STATE OF UTAH



IN THE MATTER OF THE LIEN  
RECOVERY FUND CLAIM

:

: FINDINGS OF FACT,

OF

: CONCLUSIONS OF LAW

INTERSTATE STATE ROCK PROD-  
UCTS, INC. , Regarding the Construction  
by JEFF MITCHELL CONCRETE,  
a/k/a JMC, on the Residence of STEPH-  
ANIE MARTINI

:

AND RECOMMENDED ORDER

:

Case DOPL No. 111

:

INTRODUCTION

Subcontractor Interstate Rock Products ("Interstate" or "claimant") filed a claim as a qualified beneficiary under the Utah Lien Recovery Fund that has been denied by the Division of Occupational and Professional Licensing ("DOPL"). The reason for such denial was the original contractor's failure to conform to the statutory requirement for recovery under the fund that provides that the original contractor must be licensed at the time that it enters into the written contract with the owner. Interstate, through its attorney of record, has appealed the Order of DOPL based upon its interpretation of such statute, and has requested the Department of Commerce to issue an Order on Review granting the claim for recovery.

ISSUES REVIEWED

1. Whether for the purpose of allowing an otherwise qualified beneficiary to recover under the Utah Lien Recovery Fund, does the requirement set forth in Section 38-11-204 (3) (a) (i), UCA, that a written contract must be signed by the original licensed contractor and the owner permit the original contractor to delay obtaining its contractor's license until it begins to do its actual work under the construction phase of the contract, or must it possess such contractor's license at the time that the contract is initially executed and entered into between the required parties?

2. Whether the order issued by DOPL, when viewing the record as a whole, is supported by the substantial evidence test.

## STATUTE OR RULES PERMITTING OR REQUIRING REVIEW

Under Section 63-46b-12, UCA, entitled, "Agency Review---Procedure," a party is provided with the option of appealing to the agency to seek review of a previously issued Order by one of the Divisions within the Department of Commerce. Review of the Order appealed from is granted on that basis.

## FINDINGS OF FACT

1. Casa Bella Homes, Inc. ("Casa"), the original contractor in this matter, entered into a written contract with the homeowner, Stephanie Martini and Kjeld Jensen (collectively "owner"), for the construction of a new home on January 11, 1999. At the time that such contract was executed, Casa had not yet been issued a license as a contractor with DOPL. A little less than two months later, on March 5, 1999, Casa applied for such licensure and licensure was issued on April 6, 1999.

2. Interstate, the subcontractor claimant under the Lien Recovery Fund, which had not received payment from another subcontractor under a secondary contract for concrete which it had supplied in the construction of the home (and which other subcontractor had declared bankruptcy, thereby preventing it from collecting payment for the concrete supplied), has admitted that entry into the written contract between the original licensed contractor and the owner is a precondition to its recovery under the Lien Recovery Fund Statute. However, unlike DOPL, which has taken the customary position that the statute requires that the original contractor be licensed at the time that it enters into the written contract with the owner, claimant has taken the position that the statute only requires that the original contractor be licensed at the time that the actual construction work commences under the contract. More precisely, as stated by claimant, it was **the intent of the contractor and the owner that the "construction phase" of the construction contract spring into legal being if and when the contractor obtained his license (even though the whole contract was executed by the contractor earlier and the contract is silent on this issue). Upon obtaining his license, the construction phase was to be "activated".**

3. The contract entered into between the owner and the original contractor is "integrated" in the sense that all matters are covered under it, whether those matters relate to the design work, or the actual construction work.

4. The claimant places a great deal of emphasis as to what the intentions of the parties were under the contract and that those intentions demonstrate that the contractor was not to begin work under the construction phase of the contract until it was licensed as required by the statutory provision cited, supra; the claimant thus maintains that with licensure having been obtained by the general contractor prior to engaging in the construction phase of the contract that it executed, the intentions of the parties to

the contract should be enforced permitting the claimant to obtain recovery under the fund. It is timely to observe that **the issue is not what the parties intended, but what the law requires**; unless the requirements of the statute have been met from what has occurred, the claim of the unpaid subcontractor Interstate cannot be regarded as valid and the decision of DOPL must be affirmed.

5. Under Section 58-55-501 (8), UCA, "Unlawful Conduct", which is part of Part 5 of "Unlawful and Unprofessional Conduct--Penalties", it is stated that unlawful conduct includes "**submitting a bid for any work for which a license is required** under this chapter by a person not licensed or exempted from licensure as a contractor under this chapter (emphasis supplied). It is also stated more generally under Section 58-55-501 (1), UCA, that unlawful conduct includes "engaging in a construction trade... **acting as a contractor** in a construction trade requiring licensure, **unless the person doing any of these is appropriately licensed or exempt** from licensure under this chapter;..." These two foregoing provisions are merely reflective of the public policy, as expressed by the legislature of this state, requiring that any entity must first be licensed before acting as or representing itself as being engaged in any construction trade activities. It necessarily follows that the law of this State, as a matter of public policy, requires that when the written contract is entered into pursuant to the Lien Recovery Statute, the one representing himself to be the contractor must in fact be a licensed contractor at the time of the execution of the contract for construction.

6. Casa Bella violated the law by submitting a bid for the construction of the home without being licensed, and it also went one step beyond by entering into the contract for construction without having such license.

### CONCLUSIONS OF LAW

1. For an otherwise qualified subcontractor beneficiary to be successful in having its claim honored under the Lien Recovery Fund, the original contractor and the single residence homeowner must enter into a contract **at a time when the contractor is licensed**.

2. When Casa Bella as an unlicensed contractor entered into the written construction contract with the owner on the 11<sup>th</sup> day of January, 2001, a material provision of the statute that must be met in order to successfully maintain a claim under the Lien Recovery Fund was not satisfied.

3. Because of the failure of the contractor to be licensed at the time the written contract was entered into, the Interstate's claim for recovery from the Lien Recovery Fund must be denied

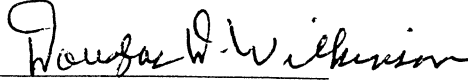
4. In reviewing the record as a whole, the Order of DOPL has met the substantial evidence test.



**RECOMMENDED ORDER**

That the determination by DOPL denying the claim of Interstate Rock Products, Inc. under the Utah Lien Recovery Fund should be affirmed.

Dated this 8<sup>th</sup> day of June, 2001



Douglas D. Wilkinson  
Enforcement Counsel

**BEFORE THE DEPARTMENT OF COMMERCE**  
**OF**  
**THE STATE OF UTAH**

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**IN THE MATTER OF THE LIEN  
RECOVERY FUND CLAIM**

:

:

:

**INTERSTATE STATE ROCK PROD-  
UCTS, INC. , Regarding the Construction  
by JEFF MITCHELL CONCRETE,  
a/k/a JMC, on the Residence of STEPH-  
ANIE MARTINI**

:

**ORDER ON REVIEW**

:

Case DOPL No. 111

:

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**ORDER**

The findings of Facts, Conclusions of Law and Recommended Order in this matter are ratified and adopted by the Deputy Director of the Department of Commerce, and it is therefore

**ORDERED** that the determination of the Department of Commerce to affirm the Order of the Division of Professional and Occupational Licensing should be and is hereby affirmed.

**SO ORDERED** this 7th day of June, 2001

*Klarice A. Bachman*  
Klarice A. Bachman  
Deputy Director  
Department of Commerce

## NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated.

## CERTIFICATE OF MAILING

I certify that on the 5<sup>th</sup> day of June, 2001, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified mail, properly addressed, postage prepaid, to:

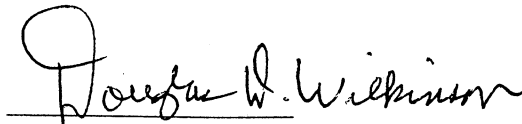
Stephen H. Urquhart, Esq., of  
THOMPSON, AWERKAMP & URQUHART  
Attorneys for Claimant Interstate Rock Products  
37 West 1070 South, Ste. 102  
St. George, Utah 84770

Sherri Flans Palmer, Esq.  
Attorney for Jeff Mitchell and Jeff Mitchell Concrete  
3600 Market St Ste 203  
West Valley City, Ut 84119

Tony Patterson, Esq.  
Assistant Utah Attorney General  
160 East 300 South, 5<sup>th</sup> floor  
P.O. Box 140872  
Salt Lake City, Utah 84114

and hand delivered a copy of the same to

Klarice A. Bachman  
Deputy Director  
Department of Commerce  
State of Utah

  
\_\_\_\_\_  
Douglas D. Wilkinson  
Enforcement Counsel

F Y I Kay.

Doug asked AG to represent us.  
Blaine Ferguson picked up a copy of the  
Petition from Doug on Friday 7/6/01.

COPY

THOMPSON, AWERKAMP & URQUHART

Ronald W. Thompson, #3242

Stephen H. Urquhart, #7445

37 West 1070 South, Ste. 102

St. George, Utah 84770

Telephone (435) 628-7777

FIFTH DISTRICT COURT

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WASHINGTON COUNTY

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UTAH DEPT. OF  
COMMERCE

Attorneys for Plaintiff

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY  
STATE OF UTAH

INTERSTATE ROCK PRODUCTS, INC.,

Petitioner,

v.

UTAH DEPARTMENT OF COMMERCE,

Respondent.

2000-1006-01

PETITION FOR REVIEW OF  
AGENCY ACTION

Case No. 010501365

Judge: Beacham

COMES NOW Interstate Rock Products ("Petitioner") to petition review of action taken by the Utah Department of Commerce ("Respondent") concerning a claim by Petitioner pursuant to the residence lien recovery fund ("RLRF"), Utah Code Annotated, sections 38-11-101 et seq.

STATEMENT OF FACTS

1. Petitioner is a Utah Corporation with its principle place of business located at 42 South 850 West, Suite 201, Hurricane, Utah, 84737.
2. Respondent is a Department of the State of Utah under the directorship of Ted Boyer with its principle place of business located at the Heber Wells Building, 160 East 300 South, P.O. Box 146701, Salt Lake City, Utah, 84114.
3. On or about, June 7, 2001, Petitioner entered an "Order on Review" affirming an

earlier Order of the Division of Professional and Occupational Licensing ("DOPL") which denied Petitioner's claim under the RLRf. A true and correct copy of Petitioner's Order is attached hereto as Attachment 1.

4. Petitioner's Order ratified and adopted Findings of Fact, Conclusions of Law and Recommended Order ("Recommendations") which somehow is dated June 8, 2001. A true and correct copy of the Recommendations is attached hereto as Attachment 2.

5. A true and correct copy of DOPL's original Order, entered March 16, 2001, is attached hereto as Attachment 3.

6. The action arises out of Petitioner's attempt to collect money owed by cement contractor Jeff Mitchell.

7. Jurisdiction and venue are proper before this court pursuant to Utah Code Annotated, section 63-46b-15.

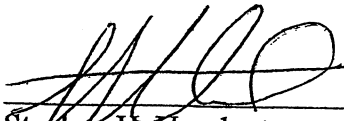
8. Petitioner has complied with all of the requirements of the RLRf in submitting its claim for the original amount of \$9,975.03.

9. Respondent denied petitioner's claim based on its interpretation of Utah Code Annotated, section 38-11-204(3)(a)(i), and the contract entered into between the homeowners Stephanie Martini and Kjeld Jensen and the original contract Casa Bella Homes, Inc.

10. Respondent's interpretation of law and fact related to the statute and contract are erroneous and should be reversed by this Court. Affidavits of the parties to that contract clearly show that the intent of the parties was to phase the contract so that all construction portions would be activated if and when Casa Bella's principal, Alicia Green, became licensed. In conformance with that intent, the construction contract was entered into after Ms. Green became licensed. Thus, the terms of section 38-11-204(3)(a)(i) were satisfied.

11. Petitioner's original claim should be awarded against the RLRF (\$9,975.03), along with all fees and costs incurred by Petitioner as a result of Respondent's erroneous denial of such claim.

DATED this 6<sup>th</sup> day of July, 2001.

  
\_\_\_\_\_  
Stephen H. Urquhart  
Attorney for Petitioner